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In the Supreme Court of the United States

OCTOBER TERM, 1991

THREE BUOYS HOUSEBOAT VACATIONS U.S.A., LTD., PETITIONER

v.

HARVEY G. MORTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. 1333(1), which confers admiralty and maritime jurisdiction on the district courts, extends to an artificial lake that is presently incapable of sustaining interstate commercial navigation.

2. Whether the Limitation of Liability Act, 46 U.S.C. App. 181 *et seq.*, applies to claims over which the federal courts would not otherwise exercise admiralty and maritime jurisdiction.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner is in the business of chartering houseboats on the Lake of the Ozarks, which lies entirely within the State of Missouri. The Lake of the Ozarks consists of waters of the Osage River (a tributary of the Missouri River) that are impounded by the Bagnell Dam. Because the Bagnell Dam has no locks, commercial vessels do not pass from the Lake of the Ozarks to waters outside Missouri. Pet. App. A12, A15.

On August 2, 1987, one of petitioner's service vessels, a 20-foot fiberglass boat, collided with a houseboat on the Lake of the Ozarks. Two occupants of the houseboat were killed; three other occupants of the houseboat and

one of petitioner's employees were injured; and petitioner's service boat sank. Respondents filed actions against petitioner and its service vessel in Missouri state courts, seeking recovery for wrongful death, personal injury, and property damage. Pet. App. A2, A12.

2. Petitioner then commenced this action in the United States District Court for the Eastern District of Missouri. The complaint alleged that, under the Limitation of Liability Act, 46 U.S.C. App. 181 *et seq.*, petitioner's liability to respondents was limited to the value of the sunken service vessel.[1] The complaint alleged that the district court had subject matter jurisdiction under 28 U.S.C. 1333(1), the statutory grant of federal admiralty jurisdiction; 28 U.S.C. 1331, the grant of general federal question jurisdiction; and 28 U.S.C. 1337, which confers federal jurisdiction over actions "arising under any Act of Congress regulating commerce."

The district court dismissed the action. Pet. App. A27-A37. It first addressed the availability of admiralty jurisdiction. The court noted that, under the Eighth Cir-

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[1] Under specified conditions, the Limitation of Liability Act provides that "[t]he liability of the owner of any vessel" for damage or losses arising from a casualty involving the vessel shall not "exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." 46 U.S.C. App. 183. A shipowner seeking the benefit of the Act files a petition to limit its liability in a federal district court. 46 U.S.C. App. 185. Upon the filing of a petition, the Act mandates procedures analogous to those of a bankruptcy proceeding. All persons with claims against the owner or the vessel receive notice of the limitation proceeding and are admonished to file their claims in that proceeding. The district court is authorized to stay all other litigation on such claims. When there are multiple claims against the vessel owner and the value of the claims exceeds the value of the vessel, the federal court adjudicates whether the owner is entitled to limit its liability under the Act and the extent to which the owner is liable to each claimant. If the owner is found to be entitled to the benefit of the Act, the value of the vessel is apportioned among the successful claimants. See 46 U.S.C. App. 185; Fed. R. Civ. P. Supp. F(3); 3 A. Jenner, E. Flynn & J. Loo, *Benedict on Admiralty* §§ 51-52 (7th ed. 1990).

cuit's decision in *Livingston* v. *United States*, 627 F.2d 165, 170 (1980), cert. denied, 450 U.S. 914 (1981), admiralty jurisdiction was dependent upon "contemporary navigability in fact." See Pet. App. A31. Finding that the Lake of the Ozarks is presently incapable of sustaining interstate commercial navigation, the district court concluded that the Lake of the Ozarks "is not 'navigable' for purposes of admiralty jurisdiction, and thus, is not within the admiralty jurisdiction." *Id.* at A31, A33.

The district court next concluded that 28 U.S.C. 1331 and 1337 did confer subject matter jurisdiction over the action, reasoning that the case arose under the Limitation of Liability Act, a statute that the court found to have been enacted pursuant to the Commerce Clause. Pet. App. A34-A35. The court concluded, however, that the Limitation of Liability Act "is properly limited to incidents occurring on waters which are 'navigable' for purposes of admiralty jurisdiction and does not extend to a collision on non-navigable waters." *Id.* at A36. Thus, the court held, the complaint failed to state a claim on which relief could be granted. *Id.* at A37.

3.a. The Eighth Circuit affirmed the dismissal of the action. It held that the district court lacked subject matter jurisdiction and, in the alternative, that the Limitation of Liability Act was not applicable to waters outside the scope of admiralty jurisdiction. Pet. App. A11-A23. Like the district court, the court of appeals found that the reasoning of *Livingston* v. *United States*, 627 F.2d at 170, foreclosed admiralty jurisdiction. Although "the Lake of the Ozarks is capable of sustaining commercial shipping," the court explained, navigability for purposes of admiralty jurisdiction "requires interstate or foreign commercial shipping." Pet. App. A15.[2]

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[2] The court observed that although *Loc-Wood Boat & Motors* v. *Rockwell*, 245 F.2d 306, 307 (8th Cir. 1957), and *George* v. *Beavark, Inc.*, 402 F.2d 977, 978 (8th Cir. 1968), "seem to provide strong support for [petitioner's] contentions," those decisions were effectively overruled in *Livingston*. Pet. App. A15. (*Loc-Wood* stated

The court of appeals also held that 28 U.S.C. 1331 and 1337 did not confer federal jurisdiction over this action, because the action "arose under state tort law and cannot be said to have arisen under the Limitation of Liability Act." Pet. App. A16. The court explained that the action would be "resolved according to Missouri state law" and that, for purposes of jurisdiction, "the Limitation of Liability Act is * * * akin to a defense." *Id.* at A17. The court found further support for its conclusion in decisions from other circuits holding that the Limitation of Liability Act "does not provide an independent source of subject matter jurisdiction." *Id.* at A18.

Finally, the court concluded that even if Section 1331 or Section 1337 provided jurisdiction, "the territorial application of the Limitation of Liability Act is limited to waters that are navigable in fact for purposes of admiralty jurisdiction." Pet. App. A22. The court rejected petitioner's contention that an 1886 amendment to the Act, extending it to "all vessels used on lakes or rivers or in inland navigation," 46 U.S.C. App. 188, warranted a different conclusion. Noting that the Limitation of Liability Act had excluded inland navigation when first enacted in 1851, the court determined that the 1886 amendment "merely extended the Act's protections to all vessels within the court's admiralty jurisdiction, including those that were not being operated in the tidewaters." Pet. App. A20. The amendment did not, the court continued, "expand the Act's application to waters which are non-navigable for purposes of admiralty and maritime jurisdiction." *Ibid.*

b. Petitioner filed a petition for certiorari. This Court granted the petition, vacated the court of appeals' judgment, and remanded for further consideration in light of *Sisson* v. *Ruby*, 110 S. Ct. 2892 (1990). 110 S. Ct.

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that the Lake of the Ozarks was navigable for purposes of admiralty jurisdiction.) In its later opinion in this case, the court overruled *Loc-Wood*. See note 4, *infra*.

3265 (1990). On remand, the court of appeals again affirmed. Pet. App. A1-A10.

The court noted that *Sisson* confirmed that "[a]dmiralty jurisdiction as to torts requires locality (the situs of the waterway) and nexus (the status of vessel or activities)." Pet. App. A3. *Sisson*, the court of appeals continued, addressed the nexus prong and said "nothing about what actually constitutes a navigable waterway." *Ibid.* Accordingly, the court reiterated its determinations that the Lake of the Ozarks is not navigable for purposes of admiralty jurisdiction; that federal jurisdiction is also unavailable under 28 U.S.C. 1331 and 1337; and that the Limitation of Liability Act is coextensive with admiralty jurisdiction. Pet. App. A5-A9.[3]

DISCUSSION

In our view, the court of appeals was correct in concluding that neither general federal admiralty jurisdiction nor the Limitation of Liability Act extends to the Lake of the Ozarks because it is presently incapable of sustaining interstate commercial navigation. There is no conflict among the courts of appeals that warrants this Court's review. Further, although the lower courts' reasoning is potentially inconsistent with a broad reading of *Richardson* v. *Harmon*, 222 U.S. 96 (1911), we do not believe that the inconsistency need be resolved in this case.

1. Under the Constitution, the judicial power extends "to all Cases of admiralty and maritime Jurisdiction." U.S. Const. Art. III, § 2, Cl. 1. Congress in turn has granted the district courts exclusive jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which

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[3] The panel overruled *Loc-Wood* to the extent that it was inconsistent with *Livingston*; the panel noted that it had circulated the opinion to the full court and had received approval for that action. Pet. App. A7 & n.5.

they are otherwise entitled." 28 U.S.C. 1333(1). Tort claims must satisfy two requirements to fall within this jurisdiction. The tort must occur "upon the high seas or navigable waters," *Sisson* v. *Ruby*, 110 S. Ct. 2892, 2895 (1990), and it must bear "a substantial relationship to traditional maritime activity," *id.* at 2897-2898.[4] This case concerns the first requirement: the nature of the "navigable waters" to which admiralty jurisdiction extends.

a. Until the mid-1800s, admiralty jurisdiction was limited to the tidewaters—the high seas, salt water ports, and those inland waterways affected by the ebb and flow of the tide. *Waring* v. *Clarke*, 46 U.S. (5 How.) 441, 464 (1847). See *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 429 (1825). The justification for that limitation was purely historical. At the time of the Revolution and the ratification of the Constitution, the jurisdiction of English admiralty courts was limited by the tidewater doctrine, and nearly all of the significant navigable waters in the original 13 States were tidewaters. See *The Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443, 455 (1852).

The growth of commercial maritime activity on the Mississippi and the Great Lakes exposed the artificiality of the tidewater doctrine. It made no practical sense to have admiralty jurisdiction (and the established body of substantive maritime law that accompanied it) stop at some arbitrary point on the Mississippi River, or to withhold that system of law from lakes that were functionally indistinguishable from the high seas. See 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ .200[3], at 2072 (2d ed. 1988). Consequently, in 1845, Congress enacted a statute extending admiralty jurisdiction to a specified class of vessels engaged in interstate commerce on "the

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[4] See also *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668 (1982); *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972).

lakes and navigable waters connecting said lakes." Act of Feb. 26, 1845, ch. 20, 5 Stat. 726.

In *The Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) at 453-460, a case arising out of a collision on Lake Ontario, the Court upheld the 1845 statute as a valid exercise of legislative power implicit in the constitutional grant of admiralty jurisdiction.[5] The Court overruled prior cases that had limited admiralty jurisdiction to tidewaters, reasoning (*id.* at 454 (emphasis added)):

> Now there is nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor any thing in the absence of a tide that renders it unfit. *If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same.* And if a distinction is made on that account, it merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it.

Subsequent decisions filled in the broad conception of admiralty jurisdiction recognized in *The Propeller Genesee Chief*. In *Jackson* v. *The Steamboat Magnolia*, 61 U.S. (20 How.) 296, 299-301 (1858), the Court made clear that the original statutory grant of admiralty jurisdiction, Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77, extended to all rivers navigable from the sea, without regard to the action of the tide. In *The Propeller Commerce*, 66 U.S. (1 Black) 574, 578-579 (1862), the Court held that admiralty jurisdiction extends to a tort on navigable waters regardless of whether the vessels involved are engaged in an interstate or foreign voyage. Accord *The Belfast*, 74 U.S. (7 Wall.) 624, 641-642 (1869). In *The Hine* v. *Trevor*, 71 U.S. (4 Wall.) 555, 569 (1867), the Court summarized the upshot of these decisions as

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[5] See *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 360-361 (1959) (explaining the nature of the authority conferred on Congress by the constitutional grant of admiralty jurisdiction).

follows: "The admiralty jurisdiction, to which the power of the Federal judiciary is by the Constitution declared to extend, * * * covers the entire navigable waters of the United States." Accord *Insurance Co.* v. *Dunham*, 78 U.S. (11 Wall.) 1, 25 (1871). See *The Eagle*, 75 U.S. (8 Wall.) 15, 26 (1869) (holding that the 1789 statute conferred admiralty jurisdiction with respect to all such navigable waters).

b. Since *The Propeller Genesee Chief*, the principal determinant of admiralty jurisdiction has been interstate or foreign navigability "in fact." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172 n.7 (1979). The basic test is whether a body of water is currently capable of supporting interstate or international commercial navigation. *The Propeller Genesee Chief*, 53 U.S. (12 How.) at 454 (jurisdiction logically extends to "public navigable water, on which commerce is carried on between different states or nations"); *Ex parte Boyer*, 109 U.S. 629, 632 (1884) (admiralty jurisdiction extends to waters serving as "a highway for commerce between ports and places in different States").[6] Consistent with this standard, the Court has recognized that man-made improvements may open new bodies of water to interstate navigation and thereby result in an extension of admiralty jurisdiction. *Ex parte Boyer*, *supra* (admiralty jurisdiction encompasses action arising from a collision on the Illinois and Lake Michigan Canal); *The Robert W. Parsons*, 191 U.S. 17, 26-28 (1903) (there is no "distinction in principle" between "canals" and "other navigable waters"); *Marine Transit Corp.* v. *Dreyfus*, 284 U.S. 263, 271-272 (1932) (New York Barge Canal is within admiralty jurisdiction).

This case presents the reverse of the fact pattern at issue in *Ex parte Boyer*, *The Robert W. Parsons*, and *Marine Transit Corp.*, *supra*. The lower courts found

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[6] See also *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871); *The Montello*, 87 U.S. (20 Wall.) 430 (1874). Although these cases involved the scope of federal statutes enacted pursuant to the Commerce Clause, see *Kaiser Aetna* v. *United States*, 444 U.S. at 172, they are often cited in the context of admiralty jurisdiction.

that the Bagnell Dam has made the Osage River impassible to commercial navigation between States. Although this Court has never had occasion to consider that situation, the logic of the cases outlined above suggests that a fundamental change in the physical condition of a waterway that makes interstate commercial navigation infeasible should result in the withdrawal of admiralty jurisdiction. Admiralty jurisdiction was extended to inland waterways and canals because there was no intelligible distinction, in terms of the considerations underlying admiralty jurisdiction, between tidewaters and other interstate waterways or between artificial and natural waterways that support interstate commercial navigation. The same reasoning suggests that when a fundamental change in conditions, such as the construction of a dam, closes a waterway to interstate commercial navigation, that waterway should henceforth be afforded the same treatment as a lake whose natural features permit only intra-State commercial navigation.[7]

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[7] In *Ex parte Boyer*, 109 U.S. at 632, this Court reserved the question "whether the admiralty jurisdiction of the district court extends to waters wholly within the body of a State, and from which vessels cannot so pass as to carry on commerce between places in such State and places in another State or in a foreign country." One commentator has questioned the logic of withholding admiralty jurisdiction from bodies of water that are capable of supporting commercial navigation within a single State. See 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ .200[3], at 2076 (2d ed. 1988). But see G. Gilmore & C. Black, *The Law of Admiralty* 32-33 & n.103 (2d ed. 1975); 1 S. Friedell, *Benedict on Admiralty* § 146, at 9-16 & n.7 (rev. 7th ed. 1991). However, in *Nelson* v. *Leland*, 63 U.S. (22 How.) 48, 56 (1860), this Court indicated that interstate commercial navigation was required for admiralty jurisdiction, and the lower federal courts have repeatedly adhered to that limitation. *E.g.*, *Minix* v. *Fellers*, 654 F. Supp. 1127 (N.D. Cal. 1987); *Reynolds* v. *Bradley*, 644 F. Supp. 42, 45 (N.D.N.Y. 1986); *Reed* v. *United States*, 604 F. Supp. 1253, 1268 (N.D. Ind. 1984); *Oseredzuk* v. *Warner Co.*, 354 F. Supp. 453 (E.D. Pa. 1972), aff'd, 485 F.2d 680 (3d Cir. 1973), cert. denied, 415 U.S. 977 (1974); *In re Stephens*, 341 F. Supp. 1404 (N.D. Ga. 1965); *Doran* v. *Lee*, 287 F. Supp. 807, 809-810 (W.D. Pa. 1968); *In re Builders Supply Co.*, 278 F. Supp.

As this Court has often noted, the fundamental purpose of federal admiralty jurisdiction is the protection of maritime commerce. *Exxon Corp.* v. *Central Gulf Lines, Inc.*, 111 S. Ct. 2071, 2076 (1991); *Sisson* v. *Ruby*, 110 S. Ct. at 2898; *Foremost Inc. Co.* v. *Richardson*, 457 U.S. at 674. That jurisdiction ensures that disputes which may affect interstate or foreign maritime commerce can be resolved in a federal forum in accordance with a uniform body of federal admiralty law. See *Sisson* v. *Ruby*, 110 S. Ct. at 2896. When a body of water is no longer capable of being used as a highway for interstate or foreign maritime commerce, the basis for providing federal forum and a uniform body of admiralty law is substantially reduced. The fact that the barrier to commerce is man-made is immaterial to the justification for the jurisdiction. See 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ .200[3], at 2077-2078 n.25 (2d ed. 1988).[8]

States have long prescribed laws governing those waters that fall outside the grant of admiralty jurisdiction, see *The Hine* v. *Trevor*, 71 U.S. (4 Wall.) at 561,

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254, 256-257 (N.D. Iowa 1968); *Marine Office of America* v. *Manion*, 241 F. Supp. 621 (D. Mass. 1965); *Shogry* v. *Lewis*, 225 F. Supp. 741 (W.D. Pa. 1964); *In re Madsen's Petition*, 187 F. Supp. 411 (N.D.N.Y. 1960). Whatever its merits as an original matter, the requirement of interstate or foreign navigability is too well established to warrant reconsideration at this time, at least in the absence of action by Congress. See 46 U.S.C. App. 740 (extending admiralty jurisdiction to shoreside injuries caused by vessels on navigable waters).

[8] We do not suggest that a transient feature, such as a wreck left in place for a limited period, would suffice to preclude admiralty jurisdiction. Admiralty jurisdiction extends to bodies of water that, because of natural conditions, are navigable only at certain times of the year, see *Sanders* v. *Placid Oil Co.*, 861 F.2d 1374, 1376-1378 (5th Cir. 1988), and temporary man-made obstructions would call for similar treatment. On the scale of time relevant to maritime commerce, however, the Bagnell Dam cannot fairly be considered transient. It has fundamentally altered the configuration of the waters in its vicinity, and it would require a major public works project to remove it or to create a commercial water route bypassing it.

and that law is available to resolve disputes of the sort involved in this case. Congress, of course, may exercise its authority under the Commerce Clause or other enumerated powers to prescribe federal standards on issues of national importance; any such standards would then be binding on state or federal courts.[9] Absent a present justification for admiralty jurisdiction, there is no sound reason to displace state law applicable to single-state bodies of water. See *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 272-273 (1972); *Victory Carriers, Inc.*, v. *Law*, 404 U.S. 202, 211-212 (1971).

c. There is no conflict among the courts of appeals on this question. The Ninth and Seventh Circuits have held that the admiralty jurisdiction does not extend to bodies of water that, although once used for interstate commercial navigation, have been closed by dams. *Adams* v. *Montana Power Co.*, 528 F.2d 437, 439 (9th Cir. 1975); *Chapman* v. *United States*, 575 F.2d 147, 151 (7th Cir.) (en banc), cert. denied, 439 U.S. 893 (1978). In this case, the Eighth Circuit has committed itself to the same approach, overruling an earlier decision, *Loc-Wood Boat & Motors* v. *Rockwell*, *supra*, that conflicted with *Adams* and *Chapman*. See notes 2, 4, *supra*. The reasoning of decisions in other circuits is also consistent with the approach applied in the instant case.[10]

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[9] "[T]here is no doubt that Congress may prescribe the rules of the road, define the conditions under which running lights shall be displayed, require the removal of obstructions to navigation, and exercise its authority for such other reason as may seem to it in the interest of furthering navigation or commerce." *Kaiser Aetna* v. *United States*, 444 U.S. at 174.

[10] See *Sanders* v. *Placid Oil Co.*, 861 F.2d at 1377-1378 (finding admiralty jurisdiction because access to lake was possible over artificial weir during a significant portion of the year); *Price* v. *Price*, 929 F.2d 131, 134 (4th Cir. 1991) (holding that admiralty jurisdiction extends to artificial *interstate* lake that is presently capable of sustaining commercial navigation); *Finneseth* v. *Carter*, 712 F.2d 1041, 1044-1045 (6th Cir. 1983) (same).

Although *Finneseth* criticized the reasoning of *Livingston*, see 712 F.2d at 1045, this case does not involve the point on which the

d. Petitioner's principal contention is that the terms of the Federal Power Act license for the Bagnell Dam, federal statutes, and decisions of this Court establish that the Lake of the Ozarks is navigable. Pet. 4-5, 10-12. Petitioner's reliance on these authorities is misplaced, however, since they do not suggest navigability *for purposes of admiralty jurisdiction.*

The concept of "navigable waters," as this Court observed in *Kaiser Aetna* v. *United States*, 444 U.S. 164, 171 (1979), is used not only to determine the scope of admiralty jurisdiction, but also "to define the scope of Congress' regulatory authority under the Interstate Commerce Clause, to determine the extent of the authority of the Army Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899," and "to delimit the boundaries of the navigational servitude" held by the United States. See also *Utah Division of State Lands* v. *United States*, 482 U.S. 193, 195-198 (1987) (addressing the "navigable waters" that are subject to the "equal footing" doctrine).[11] Navigability thus has different

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Sixth Circuit took issue with *Livingston*. See Pet. 13; Pet. Supp. Br. 3. In *Livingston*, the accident occurred *below* a dam on a tributary of the Mississippi River. See 627 F.2d at 166. Thus, there remained a continuous interstate water connection between the point on the tributary where the accident occurred and the sea. The Eighth Circuit held, nevertheless, that admiralty jurisdiction was unavailable because the dam had terminated commercial navigation on the tributary. (Beneath the dam, where the accident in *Livingston* occurred, the absence of commercial navigation resulted from the dam's effect on the flow of the tributary. See 627 F.2d at 168.) *Finneseth*, another case in which the body of water involved connected more than one State, noted that the stream at issue in *Livingston* "straddled" two States and criticized *Livingston* for failing to acknowledge that *potential* commercial navigation in an *interstate* waterway may sustain admiralty jurisdiction. 712 F.2d at 1045. The instant case does not present a similar issue. The lower courts assumed that *actual* commercial navigation occurs on the Lake of the Ozarks, but held that the dam made *interstate* commercial navigation impossible.

[11] It is now clear that Congress's authority under the Commerce Clause is not limited by any conception of navigability. See, *e.g.*,

meanings in different contexts; a body of water may be navigable in one sense, but not another. See *Kaiser Aetna*, 444 U.S. at 172-173. None of the exercises of federal authority on which petitioner relies purport to identify waters subject to admiralty jurisdiction.[12] There

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United States v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 426-427 (1940); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985) (holding that the Clean Water Act's definition of "navigable waters," 33 U.S.C. 1362(7)), includes not only those waters that are navigable in fact, but also "nonnavigable intrastate waters whose use or misuse could affect interstate commerce").

[12] In 33 U.S.C. 41, which was enacted before the construction of the Bagnell Dam, Congress declared that the Osage River is not navigable beyond a point upstream from where the dam now lies. But this declaration of navigability relates to the Army Corps of Engineers' broad power, derived from statutes enacted pursuant to the Commerce Clause, to regulate all waters that were navigable in their natural state. See 33 U.S.C. 1 and 401; *Economy Light & Power Co.* v. *United States*, 256 U.S. 113, 123 (1921) (recognizing, in the context of the Corps' regulatory authority, that "a river having actual navigable capacity in its natural state and capable of carrying commerce among the States, is within the power of Congress to preserve for purposes of future transportation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions"). Section 41 thus involves no legislative determination on the availability of admiralty jurisdiction. The condition in the Federal Power Act license for the Bagnell Dam—which reserves federal power to require navigational improvements or the removal of the dam—also reflects an exercise of Congress's power under the Commerce Clause to preserve the potential navigability of the Osage River. Similarly, the Coast Guard's authority over the Lake of the Ozarks also reflects a broad legislative grant of power conferred pursuant to the Commerce Clause, rather than a determination as to admiralty jurisdiction. See, *e.g.*, 14 U.S.C. 81 *et seq.* In *Land & Lake Tours* v. *Lewis*, 738 F.2d 961, 963, cert. denied, 469 U.S. 1038 (1984), the Eighth Circuit recognized that the Coast Guard may regulate maritime activity—in that case, by conducting safety inspections of vessels—on waters that are not subject to admiralty jurisdiction.

Petitioner also relies on the Act of Mar. 3, 1811, ch. 46, § 12, 2 Stat. 666. This statute, now codified at 33 U.S.C. 10, declares that "[a]ll the navigable rivers and waters in the former Territories of

is no dispute that the Coast Guard and the Corps of Engineers may properly exercise broad authority over the Lake of the Ozarks, but admiralty jurisdiction is governed by a different concept of navigability.

2. This case also raises the question whether the Limitation of Liability Act empowers federal courts to limit and resolve liabilities that would not otherwise be subject to admiralty jurisdiction. That question was also presented in *Sisson* v. *Ruby*, *supra*, but the Court ultimately did not decide it. 110 S. Ct. at 2894 n.1. We believe that the Act does not reach claims that are otherwise outside admiralty jurisdiction and, therefore, that the court of appeals was correct in its conclusion that the Act has no application to torts occurring on the Lake of the Ozarks.[13] Although that position is inconsistent with a broad reading of *Richardson* v. *Harmon*, *supra*, the lower courts have consistently declined to apply the Limitation of Liability Act to inland lakes that will not support interstate commercial navigation. In that particular context, therefore, the scope and continuing vitality of

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Orleans and Louisiana shall be and forever remain public highways." This statute asserts perpetual *federal* authority over waters brought within the Union by the Louisiana Purchase, but does not address admiralty jurisdiction.

[13] This Court has made clear that petitions filed under the Limitation of Liability Act are within the exclusive federal *admiralty* jurisdiction. *Providence & New York S.S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578, 594-595 (1883). Thus, we disagree with the district court's conclusion that a federal court may exercise general federal question jurisdiction over limitation of liability proceedings. See generally *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 359-380 (1959) (admiralty claims do not arise under federal law within the meaning of statutory grant of general federal question jurisdiction). However, in *Richardson*, this Court evidently construed the Act to entail a grant of admiralty jurisdiction sufficient to encompass all claims within its scope. In our view, therefore, the questions whether the district court had subject matter jurisdiction and whether the complaint stated a claim are indistinguishable; both turn on the scope of the Act.

Richardson are not issues calling for this Court's attention.

a. In *Sisson* v. *Ruby*, *supra*, we argued that the Limitation of Liability Act should not be construed to permit shipowners to limit their liability for non-maritime claims—*i.e.*, claims that would otherwise be outside admiralty jurisdiction.[14] That is so because the Act is best understood as a statutory addition to the general system of admiralty and maritime law that incorporates the pre-existing limits of that system, rather than as a free-standing provision of independent scope. See *The "Scotland"*, 105 U.S. 24, 29-30 (1882) (the Limitation of Liability Act "declares the rule which the law-making power of this country regards as most just to be applied in maritime cases"); *Providence & New York S.S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578, 593-594 (1883) (the principle of limited liability is "nothing more than the old maritime rule administered in courts of admiralty in all countries except England, from time immemorial" and "the subject-matter itself is one that belongs to the department of maritime law"); *Norwich Co.* v. *Wright*, 80 U.S. (13 Wall.) 104, 116-120 (1872) (tracing maritime and admiralty origins of the Act).

When this Court first addressed the relationship between the Limitation of Liability Act and the admiralty jurisdiction, it held that the Act did not extend admiralty jurisdiction beyond its established territorial limits. *Ex parte Phenix Ins. Co.*, 118 U.S. 610 (1886). In that case, the owner of a steamer sought to limit its liability for claims arising from a fire caused by sparks from the steamer's smokestack. Because the fire occurred on land, claims for resulting damages fell outside admiralty jurisdiction as then defined. 118 U.S. at 618-619. See *The Plymouth*, 70 U.S. (3 Wall.) 20, 35 (1886). This Court held that the district court lacked jurisdiction over the petition to limit liability.

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[14] We have served the parties with copies of our brief in *Sisson* v. *Ruby*, *supra*. In this brief, we summarize the arguments we made in *Sisson*.

A few years later, in *Butler* v. *Boston & Savannah S.S. Co.*, 130 U.S. 527, 557 (1889), the Court reiterated that the Limitation of Liability Act applies only to waters within the scope of admiralty jurisdiction:

> It being clear, then, that the law of limited liability of shipowners is a part of our maritime code, the extent of its territorial operation * * * cannot be doubtful. It is necessarily coextensive with that of the general admiralty and maritime jurisdiction, and that by the settled law of this country extends wherever public navigation extends—on the sea and the great inland lakes, and the navigable waters connecting therewith.

Accord *In re Garnett*, 141 U.S. 1, 12-18 (1891).

b. This Court's decision in *Richardson* v. *Harmon*, *supra*, departed from this settled understanding of the relationship between the Limitation of Liability Act and admiralty jurisdiction. In *Richardson*, the owners of a barge sought to limit their liability for damages arising from a collision between the barge and a bridge. The Court acknowledged that the collision was a non-maritime tort and "as such not within the cognizance of an admiralty court." 222 U.S. at 101. The Court also recognized that the resulting liability would not have been subject to limitation under the Limitation of Liability Act as originally enacted; the 1851 statute, the Court explained, "embraced liability for maritime torts, but excluded both debts and liabilities for non-maritime torts." 222 U.S. at 103. The Court concluded, however, that an amendment to the Limitation of Liability Act, Act of June 26, 1884, ch. 121, § 18, 23 Stat. 57-58, "was intended to add to the enumerated claims of the old law 'any and all debts and liabilities' not theretofore included," including non-maritime tort claims. 222 U.S. at 105. Accordingly, it held that the district court had jurisdiction to limit liability arising out of the collision.

For the reasons set forth in our brief in *Sisson* v. *Ruby*, *supra*, at 18-21, it remains our view that the lan-

guage and legislative history of the 1884 amendment do not support *Richardson*'s ruling that the legislation was intended to broaden the Limitation of Liability Act to non-maritime claims.[15] Moreover, the 1886 amendment to the Act on which petitioner relies (Pet. 14, 16)—which extends the statute to "all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters," 46 U.S.C. App. 188—cannot fairly be construed to reach waters otherwise beyond the scope of admiralty jurisdiction. In fact, in *In re Garnett*, 141 U.S. at 12, this Court upheld the constitutionality of the 1886 Act on that understanding:

> It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several states, in order to find authority to pass the [1886 amendment]. The act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in mari-

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[15] The 1851 Act limited a vessel owner's liability for, *inter alia*, "any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner" (46 U.S.C. App. 183(a)), whereas the 1884 amendment limited the shipowner's liability "to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole" (46 U.S.C. App. 189). Nothing in these two formulations suggests that the earlier enactment, but not the latter, should incorporate limitations on general admiralty jurisdiction. The legislative history likewise suggests no intention to abandon the well-established relationship between the Act and admiralty jurisdiction. When the provision was reported to the floor of the Senate, it was described, in modest terms, as "not so great a change as appears on the face of the law." 15 Cong. Rec. 976 (1884) (remarks of Sen. Frye). Later, in a very brief exchange, one Senator suggested that its only purpose was to protect shipowners from contractual liabilities. 15 Cong. Rec. 3971 (1884) (remarks of Sen. Vest). There is no indication that Congress considered—or meant to depart from—the understanding reflected in *Ex parte Phenix*, *Butler*, and other decisions.

> time matters, it extends to all matters and places to which the maritime law extends.[16]

In our view, therefore, the Limitation of Liability Act should be limited to claims that are otherwise within admiralty jurisdiction.

c. The authorities reflect some confusion regarding the scope of the Limitation of Liability Act. On the one hand, *Richardson* is often cited for the general proposition that "[p]roceedings by vessel owners to limit their liability * * * are within the admiralty jurisdiction even if the claims limited against might not be sued upon in admiralty." 1. S. Friedell, *Benedict on Admiralty* § 225 (rev. 7th ed. 1991).[17] On the other hand, a number of courts, including the court of appeals in the instant case, have held that the Limitation of Liability Act does not

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[16] *In re Garnett* answers petitioner's contention (Pet. 16) that the 1886 amendment was passed pursuant to the Commerce Clause and thus should be construed to extend to waters not subject to admiralty jurisdiction. First, this Court made clear in *In re Garnett, supra*, that the 1886 amendment is best understood as an exercise of Congress' power under the Article III grant of admiralty jurisdiction, rather than under the Commerce Clause. Second, in 1886, as the quotation in the text reflects, the Commerce Clause was regarded as narrower than the admiralty jurisdiction conferred by Article III. In 1886, Congress would have been unlikely to view the Commerce Clause as a source of authority that would enable it to extend the Limitation of Liability Act beyond the limits of admiralty jurisdiction. In any event, there is no indication that Congress intended such a step.

[17] See, *e.g.*, *Just* v. *Chambers*, 312 U.S. 383, 386 (1941) (Limitation of Liability Act "extends to tort claims even when the tort is non-maritime"); *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21, 44-45 (1934); *Hartford Accident & Indemnity Co.* v. *Southern Pac. Co.*, 273 U.S. 207, 217 (1927) (court of admiralty acquires the right to marshal "all claims, whether of strictly admiralty origin or not"); *The No. 6*, 241 F. 69 (2d Cir. 1917); *The Rochester*, 230 F. 519, 521 (W.D.N.Y. 1916); *The Irving F. Ross*, 8 F.2d 313 (D. Mass. 1923); *In re Highland Nav. Corp.*, 24 F.2d 582, 585 (S.D.N.Y. 1927); *The Atlas No. 7*, 42 F.2d 480 (S.D.N.Y. 1930); *In re Colonial Trust Co.*, 124 F. Supp. 73, 75 (D. Conn. 1954); *The Trim Too*, 39 F. Supp. 271, 273 (D. Mass. 1941).

apply to claims that are otherwise outside admiralty jurisdiction. *David Wright Charter Service, Inc.* v. *Wright*, 925 F.2d 783, 785 (4th Cir. 1991) (per curiam); *Lewis Charters, Inc.* v. *Huckins Yacht Corp.*, 871 F.2d 1046, 1052-1054 (11th Cir. 1989); *In re Sisson*, 867 F.2d 341, 348-350 (7th Cir. 1989), rev'd on other grounds, 110 S. Ct. 2892 (1990). *Richardson*, these courts have suggested, may be limited to its facts—*i.e.*, to shoreside damage caused by vessels on waters within the scope of admiralty jurisdiction.[18] Although we agree with the result reached in these cases, we believe that their reasoning is difficult to reconcile with *Richardson*'s broad holding that, as amended in 1884, the Limitation of Liability Act covers " 'any and all debts and liabilities' [of vessel owners] not theretofore included." 222 U.S. at 105.

In *Sisson* v. *Ruby*, *supra*, we were invited to file a brief at the petition stage, and we suggested that the Court should grant further review and to consider overruling *Richardson*. In its order granting certiorari in *Sisson*, this Court requested the parties "to brief and argue the question whether or not the Court should reconsider" *Richardson*. 110 S. Ct. 863 (1990). Ultimately, however, the Court found it unnecessary to resolve that question. 110 S. Ct. at 2894 n.1.

Although the scope of the Limitation of Liability Act and the continuing validity of *Richardson* are matters that may someday call for the Court's attention, we believe that this Court need not address those issues in this case. To our knowledge, no decision suggests that the Limitation of Liability Act should be applied to inland lakes that are incapable of supporting interstate commercial navigation.[19] *Richardson* did not purport to address

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[18] Because of the enactment of the Extension of Admiralty Act, 46 U.S.C. App. 740, the precise claims at issue in *Richardson* are now within the admiralty jurisdiction of the federal courts. Thus, *Richardson*'s construction of the statute is unnecessary to enable shipowners to limit liability for such claims.

[19] See *Marroni* v. *Matey*, 492 F. Supp. 340 (E.D. Pa. 1980); *In re Stephens*, 341 F. Supp. 1404 (N.D. Ga. 1965); *Doran* v. *Lee*, 287

those waters, and thus does not bind lower courts to apply the statute in that context. Consequently, notwithstanding the uncertainty regarding *Richardson*, we do not believe that this case warrants further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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F. Supp. 807, 809-810 (W.D. Pa. 1968); *In re Builders Supply Co.*, 278 F. Supp. 254, 256-257 (N.D. Iowa 1968); *Johnson* v. *Wurthman*, 227 F. Supp. 135 (D. Ore. 1964); *In re Howser's Petition*, 227 F. Supp. 81 (W.D.N.C. 1964); *In re Madsen's Petition*, 187 F. Supp. 411 (N.D.N.Y. 1960).

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